Yusof bin Mohamed v Public Prosecutor

HIGH COURT (JOHOR BAHRU) — CRIMINAL APPLICATION NO 44-4-1995
ABDUL MALIK ISHAK J
23 MAY 1995

Criminal Procedure *— Bail — Non-bailable offence — Bail pending appeal against sentence — Accused pleaded guilty to charge — Whether bail will be granted — General principles of bail — Criminal Procedure Code (FMS Cap 6) Ch XXXVIII*

The applicant pleaded guilty to three charges under s 397 of the Penal Code (FMS Cap 45) ('the Penal Code') before the sessions court, and was sentenced to: (i) seven years' imprisonment and five strokes of the rattan; (ii) two years' imprisonment with three strokes of the rattan; and (iii) two years' imprisonment, for the respective charges. The three sentences were ordered to run consecutively. He also pleaded guilty to another charge under s 400 of the Penal Code before another sessions court, and was sentenced concurrently to eight years' imprisonment with five strokes of the rattan. The applicant filed his notices of appeal against the sentences imposed by the sessions courts in the High Court. However, the sessions court judge refused to stay execution of the imprisonment and to grant bail to the applicant pending appeal. The applicant applied for bail in the High Court.

Held, dismissing the application for bail:

(1) Under the general law on bail in Ch XXXVIII of the Criminal Procedure Code (FMS Cap 6), bail is granted as of right only in respect of a bailable offence. In respect of a non-bailable offence, the grant of bail has to be performed with judicial care. Public protection from the criminal will have to be weighed against one's presumption of innocence until found guilty.

(2) The considerations which the court take into account in deciding whether to grant bail or not are the nature and the seriousness of the offence; the character of the prosecution's evidence; reasonable possibility of the presence of the accused at the trial; reasonable apprehension of witnesses being tampered with; public protection from criminal; and other considerations, such as the propensity of the accused participating in further offences, and his likely attitude towards matters, persons or things around him.

(3) For the time being, jail was the best answer for the applicant. He had not only pleaded guilty to the charges which involved non-bailable offences in this case, it was also apparent from his previous conviction record that he had been involved in many offences of similar nature, and hence had the propensity to commit the same crime again if liberty was given to him. Further,

A the amount of cash involved was RM3m, and the applicant was on bail when he committed the offence under s 400 of the Penal Code.

[Bahasa Malaysia summary

B Pemohon mengaku salah kepada tiga pertuduhan di bawah s 397 Kanun Keseksaan (NMB Bab 45) ('Kanun Keseksaan') di mahkamah sesyen, dan telah dihukum: (i) tujuh tahun penjara dan lima sebatan rotan; (ii) dua tahun penjara dan tiga sebatan rotan; dan (iii) dua tahun penjara, untuk pertuduhan masing-masing. Ketiga-tiga hukuman tersebut dijalankan secara konsekutif. Pemohon juga C mengaku salah kepada pertuduhan yang lain di hadapan mahkamah sesyen yang berlainan, dan telah secara serentak dihukum lapan tahun penjara dan lima sebatan rotan. Pemohon memfailkan notis rayuannya di Mahkamah Tinggi terhadap hukuman yang dijatuhkan oleh mahkamah sesyen tersebut. Walau bagaimanapun, hakim D mahkamah sesyen tidak membenarkan penggantungan perlaksanaan pemenjaraan dan pemberian jaminan kepada pemohon sementara menunggu rayuan. Pemohon memohon kepada Mahkamah Tinggi untuk jaminan.

Diputuskan, menolak permohonan untuk jaminan:

E (1) Di bawah undang-undang umum mengenai jaminan dalam Bab XXXVIII Kanun Prosedur Jenayah (NMB Bab 6), jaminan adalah hanya diberikan sebagai suatu hak tertuduh jika ia melibatkan kesalahan boleh jamin. Bagi kesalahan tidak boleh jamin, pemberian jaminan harus dilakukan dengan ketelitian F kehakiman. Perlindungan awam daripada penjenayah mestilah dipertimbangkan berdasarkan anggapan ketakbersalahan seseorang sehingga dapati bersalah.

(2) Pertimbangan yang mahkamah harus mengambil kira untuk memutuskan sama ada untuk memberikan jaminan atau tidak adalah jenis dan keseriusan kesalahan; sifat keterangan pihak G pendakwa; kemungkinan yang munasabah bahawa tertuduh akan hadir pada hari perbicaraan; kekhuatiran yang munasabah bahawa saksi mungkin dipengaruhi oleh pihak pemohon; perlindungan awam daripada penjenayah; dan pertimbangan lain seperti kecenderungan tertuduh untuk melakukan kesalahan selanjutnya, H serta kelakuannya yang mungkin terhadap perkara, orang atau hal di sekelilingnya.

(3) Untuk sementara waktu, penjara adalah jawapan yang terbaik untuk pemohon. Beliau bukan sahaja telah mengaku salah terhadap pertuduhan yang melibatkan kesalahan yang tidak boleh I dijamin, tetapi adalah jelas daripada rekod sabitannya yang dahulu bahawa beliau telah terbabit di dalam banyak kesalahan yang mempunyai ciri-ciri yang sama, dan oleh itu, beliau mempunyai kecenderungan untuk melakukan jenayah yang sama lagi jikalau

diberi kebebasan. Lagipun, amaun yang terlibat ialah RM3 juta, dan pemohon telah melakukan kesalahan di bawah s 400 Kanun Keseksaan tersebut apabila dia diberi jaminan dahulu.]

Notes

For cases on granting of bail in respect of non-bailable offences, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 560–579.

Cases referred to

Babu Singh & Ors v State of Uttar Pradesh AIR 1978 SC 527 (refd)
Kashmira Singh v State of Punjab AIR 1977 SC 2147 (refd)
Kwan Wah Yip & Anor, Re [1954] MLJ 146 (folld)
Manickam & Ors v PP [1982] 1 MLJ 227 (distd)
PP v Chan Cheng Sim 1993 MMD [Dec] 1165; [1993] 3 CLJ 661; [1993] 3 AMR Supp Rep 1109 (refd)
Shanmugam v PP [1971] 1 MLJ 283 (refd)
Yanasengam & Ors v PP [1978] 1 MLJ 269 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 387–389, 392, 395, 411, Ch XXXVIII, First Schedule
Penal Code (FMS Cap 45) ss 392, 397, 400
Penal Code (Amendment and Extension) Act 1976

Tan Kok Kwang (*E Ramasamy & Co*) for the applicant.
Hanif bin Hassan (Deputy Public Prosecutor) for the respondent.

Abdul Malik Ishak J: The applicant was brought before the Sessions Court, Johor Bahru on 12 January 1995, and there he pleaded guilty to three charges, namely:

(1) case No 62–44–94 under ss 392 and 397 of the Penal Code (FMS Cap 45) ('the Penal Code'), where the applicant was said to have committed the offence on 16 April 1994, and he was sentenced to seven years' imprisonment and ordered to be whipped with five strokes of the rattan;

(2) case No 62–45–94 under ss 392 and 397 of the Penal Code, and 12 January 1994 was said to be the date of the commission of the offence where the applicant was sentenced to two years' imprisonment and ordered to be whipped with three strokes of the rattan; and

(3) case No 62–46–94 under ss 392 and 397 of the Penal Code, which was said to have been committed by the applicant on 1 November 1993, and the applicant was sentenced to two years' imprisonment.

These three offences were said to be ordered to run consecutively which fact was related to me by the learned deputy public prosecutor from the

A Bar and, surprisingly, it was not adverted to at all in the affidavit-in-reply of the learned deputy in encl 7, nor in the affidavit of the applicant in encl 3, or for that matter in the affidavit of the applicant's wife in encl 6. It is quite apparent that all parties concerned saw it fit to refrain from disclosing this fact for reasons best known to them. Be that as it may, the applicant also faced another charge before the Sessions Court, Johor B Bahru vide case No 62–90–94 under s 400 of the Penal Code alleged to have been committed on 15 August 1994, and for this offence the applicant also pleaded guilty, and was sentenced concurrently (as intimated to me by the learned deputy from the Bar) to eight years' imprisonment and ordered to receive five strokes of the rattan.

C On 3 March 1995 at 3.30pm, the learned sessions court judge refused to, first, stay execution of the imprisonment, and secondly, grant bail to the applicant. By affidavit evidence, it was established that the applicant had on 16 January 1995, filed his notices of appeal against the sentences imposed by the sessions courts.

D In the context of this application, I am to decide whether to 'bail or jail' the applicant.

The general law on bail is found in Ch XXXVIII of the Criminal Procedure Code (FMS Cap 6) ('the CPC'). Section 387 of the CPC relates to 'bailable' offences whilst s 388 of the CPC refers to 'non-E bailable' offences. Bailable offences are offences where the accused persons can be released on bail as of right. Non-bailable offences as set out in s 388 of the CPC envisages three types of situations. These situations have amply been set out in *PP v Chan Cheng Sim* 1993 MMD [Dec] 1165; [1993] 3 CLJ 661; [1993] 3 AMR Supp Rep 1109, and I need not dwell on them at length.

F Bail, in simple language, means security taken from a person to appear on a fixed date before a court. The meaning of the word 'bail' as ordinarily and commonly understood is to set free a person who is under arrest, detention or is under some kind of restraint by taking security for his appearance. It is well and good that an accused person be put on bail G pending the hearing of his appeal. But under our CPC, bail is not to be granted automatically in almost every case. Society has to be protected from the hazards of the misadventures of one who has been alleged to have committed a crime. The Public Prosecutor approaches the criminal courts with a prayer to detain the criminal in an attempt to allay the fears of society. As against this reasonable request of the Public Prosecutor as the H guardian of society, there is the accepted principle of criminal jurisprudence that a man is presumed to be innocent until he is found to be guilty. It is, I think, in an attempt to resolve this conflict of principles that the law of bails has emerged. I must say that it is not a static law but is forever growing — moulding itself with the exigencies of time and place.

I Abdul Razak J in *Yanasengam & Ors v PP* [1978] 1 MLJ 269, dismissed the bail application for an offence under s 395 of the Penal Code for gang robbery, and dealt with the cases under the amendment to the

Penal Code by the Penal Code (Amendment and Extension) Act 1976. His Lordship said this [at p 270]:

> It seems to me that the nature and seriousness of these offences seem to speak for themselves the necessity that the old rules before the amendment in applications for bail for offences punishable with life imprisonment must continue to apply if the administration of justice is to have any real effect.

In *Manickam & Ors v PP* [1982] 1 MLJ 227, where five applicants were charged in the Sessions Court, Seremban, with gang robbery under s 395 of the Penal Code, and their applications for bail before the President of the Sessions Court were dismissed, and they applied to the High Court for bail pending their trials that were scheduled on March 1982. Wong Kim Fatt JC, heard the five applications together and, in granting bail in the sum of RM4,000 to each of the applicants, had this to say [at p 229]:

> In cases where there appear reasonable grounds for believing that the accused has been guilty of an offence punishable with death or imprisonment for life, because of the seriousness of the offence charged, no bail should be granted, unless the accused satisfies the High Court that there are exceptional and special grounds justifying the granting of bail. In such an event, the burden is on the accused. In other cases of lesser charges, bail should, in my opinion, normally be granted as a matter of course, unless the prosecution can satisfy the court that in the interest of justice bail should not be granted. In all cases (whether bailable or not bailable) the High Court has the discretion to grant bail under ss 388 and 389 of the Criminal Procedure Code, but, as often been said, that discretion must always be exercised judicially. The points for consideration in granting or refusing bail may be found on p 551 of *Mallal's Criminal Procedure Code* (4th Ed).

However, on the facts, *Manickam*'s case can easily be distinguished from the present case. There the trial before the sessions court had yet to proceed whereas here the applicant had pleaded guilty to all the charges in the sessions courts as itemized earlier, and he now sought for bail pending appeal.

Reverting back to the present application, the applicant applies for a stay of execution and for bail, citing two main reasons: that he has filed his notice of appeal and that he needs his liberty so that he could collect his debts. Spenser Wilkinson J in *Re Kwan Wah Yip & Anor* [1954] MLJ 146, tackled the problem of bail rather well, and the headnote reads thus:

> A stay of execution should not be granted unless there are special reasons for so doing, and the mere fact that a notice of appeal has been given is no sufficient reason. The granting of bail pending appeal by the lower court being a matter of discretion a magistrate may, apart from the accused's statement that he intends to appeal, find in the circumstances of the case before him reasons which would justify the granting of bail. The considerations which should guide the subordinate courts in granting or refusing bail pending appeal in cases where a term of imprisonment has been imposed are the gravity or otherwise of the offence; the length of the term of imprisonment in comparison with the length of time which is likely to take for the appeal to be heard; whether there are difficult points of law

involved; whether the accused is a first offender or has previous convictions; the possibility of his becoming again involved in similar or other offences whilst at liberty; and whether the security imposed will ensure the attendance of the appellant before the appellate court.

In *Shanmugam v PP* [1971] 1 MLJ 283, Mohamed Azmi J (as he then was), emphatically stated that what constitutes exceptional and special reasons for the granting of bail must necessarily depend on the facts of each case. There his Lordship found that the very object of the application for bail was not so much for the purpose of the proposed marriage but rather to get the rape charge against the applicant withdrawn. The fact that the applicant wanted to marry the girl with a view to get the charge withdrawn was held to be insufficient to constitute exceptional and very special reasons for the purpose of granting bail under s 389.

The learned deputy in his affidavit-in-reply in encl 7 deposed that the amount of cash involved was RM3m, and that the applicant was on bail when he committed the offence under s 400 of the Penal Code. It was strenuously argued that there were no points of law involved in the appeal as the applicant had pleaded guilty to all the charges before the sessions courts. My attention was also drawn to the previous conviction record of the applicant which does not reflect well on the applicant. From the previous conviction record, it is apparent that the applicant had dabbled in crime way back in 1986 for an offence under s 392 of the Penal Code, followed by dishonestly retaining stolen property under s 411 of the Penal Code in 1988. In 1990, the applicant was convicted for armed robbery under ss 392 and 397 of the Penal Code and, finally, in 1991, the applicant breached the restriction order, and for that he was sentenced to 3½ years' imprisonment. With these previous convictions, the applicant can be said to have the propensity and the inclination to commit the same crime again if liberty was given to him. In fact, he sought for bail to enable him to collect his debts, and that by itself would open him to commit a crime in the near future. For the applicant, it was argued that the applicant might complete his imprisonment term before the appeal was finally heard and, for this reason, the stay of execution and the bail should be granted to the applicant forthwith. To this, I must respond. The record is not lengthy, and it can be prepared as soon as possible. This court sits for the hearing of criminal appeals thrice a week without fail and has disposed of quite a number of appeal cases. In fact, this court finds it difficult to fix criminal appeals for hearing as the number has drastically dwindled. Be that as it may, the applicant must be taught a lesson that crime does not pay. I am not advised as to what has happened to the cash of RM3m, and I do not propose to speculate. But one thing certain is this: an early appeal date will be fixed for the applicant. Fortunately, the position in Malaysia is not like that in India where appeals are heard after a long duration of time and where the appellant will invariably languish in prison pending hearing of his appeal, so much so that the Indian judges have to rethink and set the appellant there on bail. This is clearly seen in the judgment of

Bhagwati J, speaking for the Indian Supreme Court in *Kashmira Singh v State of Punjab* AIR 1977 SC 2147 at p 2148, where his Lordship said this:

> The appellant contends in this application that pending the hearing of the appeal he should be released on bail. Now, the practice in this court as also in many of the High Courts has been not to release on bail a person who has been sentenced to life imprisonment for an offence under s 302 of the Indian Penal Code. The question is whether this practice should be departed from and if so, in what circumstances. It is obvious that no practice howsoever sanctified by usage and hallowed by time can be allowed to prevail if it operates to cause injustice. Every practice of the court must find its ultimate justification in the interest of justice. The practice not to release on bail a person who has been sentenced to life imprisonment was evolved in the High Courts and in this court on the basis that once a person has been found guilty and sentenced to life imprisonment, he should not be let loose, so long as his conviction and sentence are not set aside, but the underlying postulate of this practice was that the appeal of such person would be disposed of within a measurable distance of time so that if he is ultimately found to be innocent, he would not have to remain in jail for an unduly long period. The rationale of this practice can have no application where the court is not in a position to dispose of the appeal for five or six years. It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the court ever compensate him for his incarceration which is found to be unjustified? Would it be just at all for the court to tell a person: 'We have admitted your appeal because we think you have a prima facie case, but unfortunately we have no time to hear your appeal for quite a few years and, therefore, until we hear your appeal, you must remain in jail, even though you may be innocent?' What confidence would such administration of justice inspire in the mind of the public? It may quite conceivably happen, and it has in fact happened in a few cases in this court, that a person may serve out his full term of imprisonment before his appeal is taken up for hearing. Would a judge not be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal? Would it not be an affront to his sense of justice? Of what avail would the acquittal be to such a person who has already served out his term of imprisonment or at any rate a major part of it? It is, therefore, absolutely essential that the practice which this court has been following in the past must be reconsidered and so long as this court is not in a position to hear the appeal of an accused within a reasonable period of time, the court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and sentence.

See also *Babu Singh & Ors v State of Uttar Pradesh* AIR 1978 SC 527 at p 532.

Since offences under ss 392, 397 and 400 of the Penal Code are non-bailable offences (see the First Schedule to the CPC), it may be appropriate, at this juncture, to list down the considerations which generally weigh with the courts in deciding as to whether the accused should be allowed to remain on bail or not. These considerations are:

(1) the nature of the offence and its seriousness;

(2) the character of the evidence on which the prosecution case rests;

A (3) reasonable possibility of the presence of the accused at the trial;

(4) reasonable apprehension of witnesses being tampered with if the accused is released on bail;

(5) the larger interest of the public and the country as a whole; and

B (6) various other considerations which may arise in the case such as the propensity, the tendency or the likelihood of the accused participating in the commission of further offences, or his proximate likely attitude, conduct or tendency towards matters, persons or things around him, or in connection with or in relation to the case at hand.

C It must not be forgotten that the considerations as listed above are not meant to be exhaustive. Indeed the considerations may be extended from time to time, developing as it were the law of bails. But one thing is certain. It is this. That the grant, refusal or cancellation of bail is a judicial act and has to be performed with judicial care after giving serious consideration to the interests of all the parties concerned.

D Reverting back to the previous question of whether I should 'bail or jail' the applicant, I propose not to accede to the applicant's application. For the time being, 'jail' is the best answer and the only antidote for the applicant. An order that the appeal be heard on 14 June 1995 was also made by me.

E *Application dismissed.*

Reported by Isabel Liong

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